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In The
Supreme Court of the United States

OCTOBER TERM 1959

No. 889

EDWARD LEON WILLIAMS,
Petitioner,

VERSUS

ROBERT R. RAINES, Warden, Oklahoma State Penitentiary;
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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APRIL, 1960.

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TO: THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Your petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered March 30, 1960, affirming the judgment of the United States District Court for the Eastern District of Oklahoma entered March 22, 1960, denying petitioner's application for a writ of habeas corpus.

OPINIONS BELOW

There was no opinion in the United States District Court for the Eastern District of Oklahoma.

The opinion of the United States Court of Appeals rendered March 30, 1960 is not yet reported, but is contained in the certified transcript of record submitted herewith and is appended to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit sought to be reviewed was dated and entered March 30, 1960.

The jurisdiction of this Court is invoked under Section 1254 (1) of Title 28 of the United States Code and Rule 19 of the Revised Rules of this Court.

QUESTIONS PRESENTED

1. In habeas corpus proceedings on behalf of a state prisoner under Title 28, United States Code, Sections 2241 through 2254, wherein District Court certified probable cause existed for appeal from order denying application for the writ, is it infringement of due process and abuse of discretion for Court of Appeals to suspend rules of appellate procedure and compel appellant to present appeal upon the merits with less than 48 hours notice?

2. In state court proceedings involving capital case wherein death penalty was inflicted, is it *per se* violation

of Due Process Clause of the Fourteenth Amendment for state to appoint new and different counsel at each stage of proceedings regardless of experience or capability of individual attorneys appointed?

3. In state court proceedings involving capital case wherein death penalty was inflicted, is it violation of Due Process clause of Fourteenth Amendment for State appointed counsel to make no investigation of the facts: fail to consult with defendant to determine if he was actually guilty of crime charged: make no preparation for hearing to which assigned: completely ignore fact that State had no evidence to prove crime: and waive at least twelve legal safeguards erected for benefit of accused?

4. In state court proceedings involving capital case wherein death penalty was inflicted is it basically unfair and a violation of the Due Process Clause of the Fourteenth Amendment for the Trial Judge in conference with court appointed attorney defending his first criminal case, for such Judge to inform attorney, (1) He had never given the death penalty and (2) That in certain instances he had objections, personally, to the imposition of the death penalty, and that (3) "Possibly" told such attorney that he did not think facts of case warranted death penalty: and, after such representations relied upon by counsel and defendant as substantial contributing factor toward entry of guilty plea, sentence defendant to death?

STATUTES INVOLVED

Title 28, United States Code, Section 2251:

"A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

"After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending."

Title 28, United States Code, Section 2253:

"In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

"There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

"An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause."

United States Constitution, Fourteenth Amendment:

"Section 1. All persons born or naturalized in the United States, and subject to jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The petitioner, Edward Leon Williams, robbed a filling station in Tulsa, Oklahoma during the early morning of June 16, 1956. He escaped capture. Late the next day, he left Tulsa in an automobile driven by a young man named Cooke. It is unknown if he forced Cooke to drive him from Tulsa to Muskogee County, Oklahoma, or if originally the drive was voluntary on Cooke's part and Williams put a gun on Cooke after they had already left Tulsa County. At a point in Muskogee County, Oklahoma, Williams shot and killed Cooke. He was later captured. A beating was administered and he confessed the killing. On November 19, 1956 he received a life sentence for the murder in the District Court of Muskogee County, upon a plea of guilty. He was then taken to Tulsa County, Oklahoma for trial on the armed robbery and kidnapping charges. On November 21, 1956, and again on November 23, 1956, and November 26, 1956 he was arraigned. Preliminary hearing was set for December 11, 1956. It was passed until December 12, 1956. On December 12, 1956 he waived preliminary hearing.

was bound over to District Court, and on January 30, 1957 entered pleas of guilty to both the armed robbery and kidnapping. On February 1, 1957 the trial judge sentenced petitioner to fifty years on the armed robbery and to death on the kidnapping. An appeal was taken to Court of Criminal Appeals, State of Oklahoma on the death sentence. This was affirmed, *Williams* v. *State* (Okla. Cr.), 321 P. 2d 990. Certiorari was granted by the Supreme Court of the United States. The three contentions raised were that the Due Process Clause of Fourteenth Amendment had been violated in (1) trial court had violated Oklahoma statutory pre-sentence proceedings, (2) Double jeopardy, (3) Excessive sentence. These contentions were not upheld by the Supreme Court of the United States, and the judgment was affirmed. *Williams* v. *State*, 358 U. S. 576, 79 S. Ct. 21, 3 L. Ed 516. Date of execution was then set by the Governor for June 5, 1959. On the morning of June 3, 1959 present counsel entered case. A petition for a writ of habeas corpus was filed before the Court of Criminal Appeals, State of Oklahoma, and rule to show cause issued and argument was set for the next morning, June 4, 1959. After argument, the Court continued the matter for fifteen days for briefs. During the next few days, present counsel consulted with petitioner for the first time and he learned facts presented herein not known by counsel at the time of filing original petition

for the writ. The questions herein involved were then raised by amendment to petition. Subpoena power was denied petitioner, and the Court of Criminal Appeals, State of Oklahoma, denied the writ on June 26, 1959, one Justice dissenting. *In re: Williams* (Okl. Cr.), 341 P. 2d 652. On August 31, 1959 petitioner filed and perfected in the Supreme Court of the United States a petition for a writ of certiorari to the Court of Criminal Appeals, State of Oklahoma, seeking the review of the judgment and order of such Court which had been entered on June 26, 1959. Such petition for a writ of certiorari was denied by the Supreme Court of the United States on February 23, 1960. On March 15, 1960 petitioner commenced the present cause in the United States District Court for the Eastern District of Oklahoma by application for writ of Habeas Corpus. A full hearing on the merits of such application was held in McAlester, Oklahoma on March 22, 1960, before District Judge Eugene Rice.

At the hearing in McAlester, petitioner subpoenaed all five of the Court appointed attorneys who had represented him during various stages of the proceedings as well as the District Judge who had sentenced him. The substance of their sworn testimony completely supported the allegations contained in petitioner's application for a writ of habeas corpus and of petitioner's testimony at the hearing. All of the attorneys admitted that they were

appointed from the courtroom just before the time of their particular service; they all admitted in general that they had made absolutely no independent investigation of the facts or considered the applicable law in the light of those facts; and they all admitted, with one exception, that they had never even discussed the facts of the case with the petitioner. That exception failed to show up at the hearing to which he was assigned. They all admitted that they did not know then or at time they represented petitioner of any evidence whatsoever the State had to show the crime committed in Tulsa County.

Fred Woodson, who was the attorney of record at the time of the trial, and John Ladner, Jr., who was present, both testified as to the conference with Judge Webb relative to a guilty plea and the Judge's statements to them. Woodson said he felt "comfortable" after talking with the Judge, and Ladner said that he not only felt "reassured", but also "encouraged" after the conversation with the Judge, and that there was a certain amount of "inducement" on the Judge's part for them to recommend a guilty plea on the part of the petitioner.

Judge Webb, the trial judge, who had sentenced petitioner to death admitted that he did hold the conference with the two attorneys shortly before he accepted the plea of guilty from the petitioner. He stated that there was a discussion of the fact that the case weighed heavily on

his mind: that he specifically told the two attorneys that he had never given the death penalty; that he did remember telling them that in certain instances he personally had objections to the death penalty and that it was "possible" that he told them from the facts as he knew them to be that he did not think this particular case warranted the death penalty. In response to a question as to whether or not he believed the record that was made at the time of sentencing petitioner and did he actually believe that petitioner's attorney had told petitioner that he would receive death upon a plea of guilty the trial judge stated that he did not know whether he believed it or not—that he was not concerned with what the defense attorney had told petitioner.

At the conclusion of petitioner's testimony, the respondent introduced that part of the record of the trial court made at the time of sentencing petitioner, and both sides rested. The response to the rule to show cause had not denied any of the allegations contained in the application.

The District Court then denied the application for the writ and entered its order. The District Court then certified that probable cause existed for appeal to the Court of Appeals and notice of appeal was immediately filed. A stay of execution was requested and denied.

The hearing in District Court was held Tuesday, March 22, 1960. On Thursday, March 24, a certificate of docket entries was obtained from the United States District Court Clerk and this certificate, with an application for a stay of execution was airmailed to the Clerk of the Court of Appeals, in Denver, for referral to the Court. Friday afternoon, March 25, 1960, the Clerk of the Court of Appeals called petitioner's attorney and told him that the application for stay had been referred to the Court and the Court would hear the appeal on the merits and consider the stay the following Wednesday, March 30, in Denver. Petitioner's attorney cited the Clerk cases for referral to the Court from the Third, Fifth and Ninth Circuits, all holding in effect as a matter of law that when the Trial Judge had certified that probable cause existed for appeal that a stay of execution should be granted and asked the Clerk to inform the Court that in lieu of argument on the merits upon such short notice with no opportunity to study the record that petitioner would withdraw his application for a stay and request stay from the Governor. About thirty minutes later, the Court Clerk called back and said he had reported the conversation to the Court and that petitioner's attorney had a choice of being ready to hear the case on the merits and have the stay considered on the following Wednesday morning, or in lieu thereof, acquire a stay from the Governor. Petitioner's attorney then in-

formed the Clerk that the application for a stay was withdrawn and that stay of execution would be sought from the Governor.

The following Monday morning, March 28, 1960 petitioner's attorney received from the Court Clerk a letter confirming these conversations of the previous Friday and suggesting that the application for stay be formally withdrawn in writing. That afternoon, at about 4:00 P.M. o'clock, petitioner's attorney received another phone call from the Clerk saying that the Court had again decided to set the case for a hearing on the merits and was to consider the application for a stay in Denver at 10:00 A.M., Wednesday, March 30, 1960. The application for stay which had been withdrawn the previous Friday was filed March 28, without the knowledge or consent of petitioner's counsel. The case was argued on the merits in Denver, Wednesday morning, March 30, and the Court rendered its decision affirming the District Court's judgment and denying stay of execution that afternoon.

In that execution date was set for the following Monday, April 4, 1960, application was made both to the Governor of the State and to Mr. Justice Whittaker for a stay of execution on Friday, April 1, 1960. On the afternoon of Friday, April 1, 1960, both the Governor and Mr. Justice Whittaker granted stay of execution.

The basis for Federal jurisdiction in the United States District Court for the Eastern District of Oklahoma in this

cause is Title 28, United States Code, Section 2241, Paragraph (C), Sub-division (3) in that petitioner is "in custody in violation of the constitution or laws or treaties of the United States." The pre-requisite of exhaustion of state remedies embodied in Title 28, United States Code, Section 2254 has been fully and completely complied with in that, although denied subpoena power, petitioner raised the contentions herein involved in his application for a writ of habeas corpus before the Court of Criminal Appeals, State of Oklahoma, *In re: Williams* (Okl. Cr.), 341 P. 2d 652, and petitioned the Supreme Court of the United States for writ of certiorari to review the adverse decision of that Court, such petition being denied February 23, 1960.

REASONS FOR ALLOWING THE WRIT

The petitioner respectfully contends that this Honorable Court should allow this writ because:

1. A substantial federal question on procedure has been raised by the method used by the Court of Appeals, Tenth Circuit, in refusing a stay of execution in the first instance and then in disposing of petitioner's application for stay of execution after it had been withdrawn. The Third, Fifth, and Ninth Circuits all hold, in effect, that in a habeas corpus matter upon the certification of probable cause for appeal by the trial judge, that a stay

of execution should be granted as a matter of law. The action of the Court of Appeals in circumvention of this, by suspension of the rules of appellate procedure, filing the application for stay without knowledge or permission of petitioner after it had been withdrawn, and then granting petitioner only 43 hours notice to study the record, brief his case and prepare for argument on the merits, departs from the accepted and usual course of judicial proceedings to such extent as to call for this Court's exercise of its power of supervision.

Further, by depriving counsel of adequate time to study the record, brief his case, and prepare his argument the action of the Court of Appeals amounts in substance to depriving petitioner of due process of law, in regard to his appeal, and raises a substantial federal question which should be decided by this Court.

2. A substantial and important federal question of law has been raised and should be decided by this Court upon the proposition that it is *per se* a violation of the Due Process clause of the Fourteenth Amendment for a state court in proceedings involving a capital case where the death penalty was ultimately inflicted to appoint in the courtroom new and different counsel at each stage of the proceedings regardless of the skill, experience or capability of the individual attorney appointed under such procedure and circumstances, such question not having been decided and passed upon by this Court.

3. The judgment of the courts below holding in effect that due process has been complied with where five different attorneys are furnished to a state court defendant in a capital case wherein the death penalty was ultimately assessed and such attorneys admit that they made no investigation of the facts of the case; that they did not consult with their client as to the facts; that they made no preparation for the proceeding to which they were appointed; that they completely disregarded what evidence, if any, that the State had to show their client guilty of the crime as charged; and that they completely disregarded a determination of the fact as to whether or not their client was actually guilty as charged; involved deciding a federal question in a way that is in conflict with what are probably the applicable decisions of this Court.

4. The decisions of the courts below in effect decided an important federal question which has not been but should be settled by this Court, such question being: just what is and what is not adequate and effective counsel within the meaning of the general admonition laid down by this Court over twenty five years ago.

5. The decisions of the courts below holding in effect that it is not a deprivation of a fundamental right, basically unfair and a violation of the Due Process Clause for a state court trial judge, in conference with a defense attorney, to make statements encouraging and inducing

a plea of guilty and after obtaining plea, sentence defendant to death, involves an important question of federal law in conflict with what are probably the applicable decisions of this Court.

6. The decisions of the courts below holding in effect that due process has not been violated by a state court in a capital case, wherein the death penalty was ultimately inflicted, when the state substituted in place of judicial and orderly procedure, with competent and effective counsel and a fair trial judge a pseudo-legal sham procedure wherein the attorneys involved through indifference or otherwise, play their part only for the record and the trial judge encourages and induces a guilty plea and sentences defendant to death on a record built for that purpose, is an important federal question that is in conflict with the applicable decisions of this Court.

ARGUMENT

The right of appeal in any case is a substantial right. It should not be ignored or made meaningless through summary treatment. The action of the Court of Appeals in compelling petitioner to argue his case on the merits with less than 48 hours notice, and only 8 days after the hearing in District Court, amounted to no appeal at all, but summary approvement of the District Court's judgment.

Petitioner was granted the right of appeal by statute in this case once the trial court certified probable cause existed. Rules of procedure prescribe a given way in which appeals to the Court of Appeals may be prosecuted in a given length of time, all supposedly designed to assure the parties and the Courts that due consideration will be given the merits of the appeal. The suspension of all the rules by the Court of Appeals in this instance, in effect, deprived petitioner of his right to appeal.

In that the trial court had certified probable cause, petitioner should have been granted a stay of execution on Friday, March 26, when the application was referred to the Court.

In *Fouquette* v. *Bernard* (1952), 198 F. 2d 96, the Ninth Circuit had this to say on the point:

> "Although the District Court denied Fouquette's motion for a stay of execution, it gave its certificate for probable cause for appeal, which was immediately taken and permitted him to appeal *forma pauperis*. Obviously, if there is probable cause for the appeal it would be a mockery of Federal justice to execute Fouquette pending its consideration."

See also *United States of America, ex rel. Del'ita* v. *McCorkle, Warden* (1954), 214 F. 2d 823 wherein the Third Circuit followed this reasoning as a matter of law, and *United States of America, ex rel. Goins* v. *Sigler, Warden* (1957), 250 F. 2d 128, wherein the Fifth Circuit agreed.

The action of the Court in compelling petitioner to choose between a hearing on the merits without time for preparation or acquiring a stay from the Governor of Oklahoma was arbitrary and capricious. Petitioner had properly invoked Federal jurisdiction before that Court, seeking protection of a Federal right, and once that was done, any right that the State might have had immediately became subsidiary and secondary.

Petitioner does not know what happened the following Monday, March 28, to cause the Court to file the application for a stay after it had been withdrawn the previous Friday, nor does petitioner know for what reason the Court compelled counsel for petitioner to come to Denver Wednesday morning, March 30, and argue the merits of the appeal. Whatever the reasons, petitioner's counsel returned from Denver Wednesday afternoon, after the argument and the adverse decision with the definite and pronounced feeling that somewhere and somehow petitioner had been "had" in so far as his appeal was concerned. This feeling was not necessarily generated from the adverse decision, but from the manner it was obtained. Such should not be the case even in a mountain town Justice of the Peace Court over a traffic fine, much less when dealing with Federal rights concerning the protec-

tion of a man's life in proceedings before a court that is right next to the Supreme Court of the United States.

Although this case has been before this Court once before, the present contentions of petitioner were not, either directly or indirectly, advanced before this Court, nor were they considered by this Court. The impression of the Court of Appeals, as reflected by its opinion to the contrary, is clearly erroneous.

Before argument on these contentions, there are two basic premises that must be understood and accepted. In the first place, we are not here concerned with petitioner's guilt nor his innocence of the crime charged. It is petitioner's contention that by depriving him of due process of law the State Court lost jurisdiction to sentence petitioner to death and his guilt or his innocence is not an issue. Once jurisdiction had been lost, then there was nothing that the Court, or petitioner, or petitioner's counsel of the moment could have done to restore that jurisdiction.

The second basic premise that must be recognized is that in this, a habeas corpus proceeding, petitioner is entitled to have a Federal Court look behind the record made by the State Trial Judge when he sentenced petitioner to death and to determine if there are facts behind

that record which caused the court to cease to have jurisdiction because due process had been violated. This basic tenet is expressed very well in *Frank* v. *Mangum* (1915), 237 U. S. 309, 59 L. Ed. 969, 35 S. Ct. 582, and approved in *Johnson* v. *Zerbst* (1938), 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461:

> "* * * Judicial inquiry in a Court of the United States into the very truth and substance of the causes of detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the State Court to proceed to judgment against him * * * It is open to the Courts of the United States to look beyond forms and inquire into the very substance of the matter * * *."

With these two hurdles out of the way, let us first consider what manner and kind of counsel the State provided petitioner in its abortive effort to comply with *Powell* v *Alabama* (1932), 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158 and the succeeding right to counsel cases. Pertinent excerpts from the record best show the attitude, lack of diligence and indifferent efforts of these court appointed attorneys in looking after their client in a case where the State's prosecuting attorney had announced that he was intending to seek the death penalty.

This is not what the petitioner says or what someone else says, but what the lawyers themselves, who were mostly hostile witnesses, said in the Federal Court hearing before Judge Rice.

Lawyer No. 1, appointed from the courtroom for arraignment, in describing his attitude said: (R. 47)

A. "* * * Now, the protest, if any, was only that I told Judge Walker that my practice normally didn't encompass criminal matters and quite frankly I desired to avoid the publicity in connection with the matter. And Judge Walker assured me that the appointment would be for the purpose of arraignment only * * *.

Q. Did you consult with the defendant in any way on the facts or make any investigation as to what the purported facts might be on the case?

A. No I did not."

Lawyer No. 2, public defender, appointed for arraignment and preliminary hearing. (R. 50):

Q. "Do you recall, Mr. Dickason, whether you made any investigation of the facts? Did you take an hour or two and go over Mr. Williams' story with him?

A. Mr. Pate * * *

Q. Of his version of what happened?

A. Mr. Pate, I know the answer to that. I've been practicing 33 years, and I always enter a plea of not guilty and you never go wrong on a criminal matter. I was public defender 10 years, and I did not, because I just entered a plea of not guilty for him.

Q. That's at the arraignment?

A. Yes, I conferred with him after that up in the jail.

Q. All right, did you decide to waive the preliminary hearing?

A. No, I was rather inclined to try that, but they burdened me down with too much work * * * I was trying to keep up the public defender deal if they would appoint somebody to help, but they never did appoint anybody, and I finally threw up my * * * I was overworked. * * *

Q. (R. 52) There was some question of a confession, perhaps an inadmissable confession. Was that discussed?

A. I don't believe so, Mr. Pate."

This attorney twice failed to appear at the preliminary hearing.

Attorneys Nos. 3 and 4 were appointed for the preliminary hearing, which under Oklahoma practice is a very vital part of procedure in the defense of a criminal case in that if the defense lawyer has made adequate investigation he has an opportunity to put under oath and obtain the testimony of every witness that the State might use against his client in the District Court trial.

Lawyer No. 3 was appointed from the courtroom just before the preliminary hearing. He and lawyer No. 4 conferred with the petitioner in the jury room prior to the waiving of the preliminary:

Q. (R. 56) "Was there any discussion between you, Mr. Leslie and Mr. Williams, as to what the actual facts were on June 17, 1956 in so far as this alleged crime is concerned?

A. We, Whit, I can only answer that by perhaps, saying this: We did discuss the matter. We advised him as to what a preliminary hearing was,

what the elements required of determining a preliminary hearing * * *.

Q. (R. 58) Was there any discussion of this purported confession?

A. There was not, I can say there was very little discussion about the facts or purported facts that would be elicited or could be elicited from the preliminary hearing * * *.

Q. Was there any discussion of what evidence, if any, that State of Oklahoma had to show that any actual kidnapping had took place in Tulsa County?

A. No, except we told him what the elements required of a preliminary hearing was, to-wit, and secondly, a reasonable grounds that the defendant committed it."

It is obvious that this is akin to a patient consulting with a doctor of medicine, say for a case of pneumonia, and having the doctor tell him that pneumonia is a respiratory disease of the lungs, usually associated with fever, pleuritic pain, cough, oftentimes resulting in death unless treatment is administered, and then having the doctor walk off and leave the patient to get well as best he could.

Q. (R. 58) "Did you go into discussion with him of any detail on the difference of the two kidnapping statutes in Oklahoma?

A. Did not.

Q. Did you determine in your own mind whether he was charged under 741 or 745, the two sections involved?

A. I did not."

Lawyer No. 4, the associate lawyer, was also at the preliminary hearing and had this to say:.

Q. (R. 62) "How long had you been appointed his attorney before you consulted with him?

A. Oh, just a few minutes. The Judge appointed us and told us to take him into the jury room and talk to him about it and we did."

Q. (R. 63) "Did you go into any of the facts of the case?

A. We didn't go into the facts very much. I remember he said he was drunk and killed this man * * *."

Q. (R. 64) "Did you or Mr. Kennon have any knowledge, any actual knowledge, of what exactly the State had in way of evidence?

A. No sir.

Q. Did you make any effort to find out?

A. No sir. The only thing I knew about it was what I read in the newspaper and what he told me."

Lawyer No. 5 was appointed from the courtroom at the time of petitioner's arraignment in District Court and served as his attorney until sentence was pronounced. This attorney was hostile all the way through and had refused to give us an affidavit when these questions were first raised in the Court of Criminal Appeals of Oklahoma in June, 1959, saying he would testify only under subpoena. He had been admitted to practice some 60 days when he was appointed to defend Williams and had only that day been designated public defender in Tulsa County.

Q. (R. 66) "Tell us as best you can, Mr. Woodson, how many times you think you may have consulted with Mr. Williams in the Tulsa County jail from December 19, 1956 to January 30, 1957?

A. Not less than 5 nor more than 10.

Q. In your capacity as attorney representing defendant, did you ever make an independent investigation of the facts that had occurred prior to June 17 so far as this kidnapping was concerned, or alleged kidnapping?

A. The only alleged facts that I made inquiry regarding were those as stated by Mr. Williams to myself in the county jail in the presence of Mr. Ladner."

Q. (R. 67) "How long had you been representing Mr. Williams when it was tentatively decided, at least, to enter a plea of guilty * * *."

A. "* * * Probably in the initial stages, Mr. Pate.

Q. (R. 54) "* * * Let me ask you this in your weighing: Can you tell me one shread of evidence that the State of Oklahoma had that you knew about or that you could have ascertained that would show that this man committed a crime in Tulsa County?

A. Probably the best evidence that I know about would have been the witnesses in Bixby.

Q. Did you ever go talk to the witnesses in Bixby?

A. No.

Q. Do you know what they would have said?

A. No sir."

Q. (R. 74) "* * * Did you attempt to ascertain whether the Tulsa County Attorney's office had such a confession, if any?

A. No. As a matter of fact, I think we were all rather surprised that Mr. Edmondson would have filed the charges in the first place."

Q. (R. 75) "Did you make a demand of the County Attorney's office in Tulsa County for a list of the witnesses that might be used against the petitioner?

A. There was a list of the witnesses on the back of the information furnished us.

Q. Did you ever go talk to any of these witnesses?

A. No, sir."

This is the same attorney who had remained mute while the trial judge drove nail after nail into the lid of the petitioner's coffin with his questions and petitioner's answers, at the time of sentencing and which constitutes the record that the respondent relies upon and does not want this or any other Court to go behind. Here is what this lawyer had to say on that point when examined:

Q. (R. 82) "Mr. Woodson, from the record that Mr. Lattimore just read, the defendant, Williams, advised the Judge that you had told him that he would receive possibly and probably receive death in the electric chair on the *robbery* charge? Did you ever tell the defendant that?

A. Oh, no, not at all.

Q. Let me ask you one other question. Did you ever tell and represent to the defendant that if he pled guilty that he would receive * * *. That he could expect death in the electric chair?

A. Absolutely not.

Q. Will you tell this Court then, and explain to this Court how it was that you could have set there and permitted that record to be built, when it does not reflect the truth?

A. • • • I recall meeting with him just before we went into the courtroom, and both of us were very nervous. I had never tried a criminal case before in my life. This was my first one; and of course, Mr. Williams had never been confronted with this same thing before in his life. I made as many waivers and I made as many objections as I knew how, and I did fully, as best I could • • •

Q. Did you take the attitude, Mr. Woodson, that this was record building?

A. Mr. Pate, I had never gone through this same procedure before, so at that time I didn't know.

Q. Did you know what record building was at that time?

A. Not then.

Q. Do you know now?

A. Yes, sir."

Added to all of this is the fact that it is undenied that the 12 legal safeguards set out in petitioner's application for a writ were actually disregarded or waived by these attorneys. One has to read only the previous opinions of the Court of Criminal Appeals, State of Oklahoma, and of this Court to see that time after time these safeguards had been waived and such waivers commented on by the appellate Courts.

We have quoted extensively from the record in this case, but we know of no better or more concise argument to show that the admonition of *Powell* v. *Alabama*, *supra*, and the succeeding right to counsel cases was not complied with, than the gross indifference and lack of zeal and dedication to their cause that is found in the answers of these five attorneys. Some of it can be attributed to plain indifference, but most of it can be blamed on the fact that the Tulsa County State Court, while paying lip service to *Powell* v. *Alabama*, did so only for record purposes and the lawyers appointed under such circumstances, like actors in a play, went through their performance and said their lines only for the purpose of making the script come out right. We urge that it is long over due for this Court to bring up one of these cases and lay down some law with teeth in it and let it be known "adequate and effective counsel at *all* stages of the proceedings" means just that and nothing less.

The respondent urged in argument and the Court of Appeals commented in its opinion on the fact that Mr. John Ladner, Jr. was commended by Supreme Court of the United States at the conclusion of his argument when this case was up before on other questions and such commendation is given weight by the respondent and the Court of Appeals on the question of petitioner's counsel. We don't dispute that John Ladner, Jr. is one of the ablest

young lawyers in Oklahoma, and never fails to take his client's cause to heart with zeal and devotion. However, the point that respondent misses, and which was missed by the Court of Appeals, is that Mr. Ladner did not become petitioner's attorney until after petitioner had been sentenced to death and proceedings were started for appeal of that sentence. Whatever Mr. Ladner may have done in petitioner's behalf is completely irrelevant because due process had been violated and the Court had long since lost jurisdiction to sentence petitioner to death before Mr. Ladner ever became petitioner's attorney. Once due process was violated, and such jurisdiction was lost, then there was nothing Mr. Ladner could or could not have done to restore that jurisdiction.

We next direct our argument to the role played by the Trial Judge in this performance produced by the State of Oklahoma, which resulted in petitioner's sentence of death.

Woodson, who was the new public defender representing petitioner, apparently decided from the beginning to plead petitioner guilty in exchange for a life sentence (R. 67). Since petitioner was already doing life for the murder, one more life sentence would make petitioner no difference, in that, as a practical matter in the State of Oklahoma, a prisoner can do two or more life sentences as quickly as he can one. Woodson and John Ladner, Jr.

first approached Judge Lewis C. Johnson, one of the four District Judges in Tulsa County. Judge Johnson assured them, in no uncertain terms, that if they pleaded petitioner guilty before him that he would execute petitioner. Being rebuffed here, they went on down the hall, seeking a more receptive Court, and found such in Judge Webb, who sentenced petitioner to death.

This was not a "pre-arraignment" statement by the sentencing court as stated in the opinion of the Court of Appeals, but was a twenty minute conference held in the Judge's chambers, specifically and for the sole purpose of determining if Judge Webb would give a life sentence in the event petitioner pleaded guilty to the kidnapping charge before him. It was held only a few days before the case was scheduled for trial. The Judge received them very cordially, after they stated their mission. Both of these attorneys swore that the Judge told them during the course of this conference that he had never given the death sentence and that under the facts of the case as he knew them to be, he did not think the case warranted the death penalty. They both swore that Judge Webb's conversation was a substantial factor in their recommending the guilty plea when such conversation was communicated to petitioner. Woodson said he felt "comfortable" after talking to the Judge and in stating to petitioner what had occurred.

John Ladner, Jr. gives the best description of this conference at Page 87 of the Record:

"From the very beginning our main interest had been to determine whether or not Mr. Williams would receive the death penalty for the kidnapping charge. In my conversation with him and in our conversation with Mr. Woodson, we tried to determine the advisability of entering a plea of guilty, to a large extent we felt that the advisability of entering a plea of guilty depended on the feelings of the trial court, naturally. I knew what the County Attorney's feeling was, because I had asked him point blank, and he said he was going to ask for the death penalty definitely. We first approached Judge Lewis Johnson of the District Court of Tulsa County and he said "Don't bring him in here. I'll give him the death penalty" We next went, and this would be to the best of my recollection, about the middle of January, 1957 to Judge Leslie Webb. We explained, again in substance, to the best of my recollection, that we were interested in trying to ascertain the advisability of perhaps entering a plea of guilty for Mr. Williams. We explained that there was some possibility that he would enter a plea of guilty if the death penalty could be avoided. We asked him if he was willing to discuss with us his feeling or reaction to this matter. We were then seated and present at that time was Judge Webb and myself and Fred Woodson. We discussed the matter. The things that stick in my mind, again in substance and to my recollection, are that Judge Webb said that he ha}

never given the death penalty before, and that in keeping with the facts as he knew them of this kidnapping, that he did not feel that the death penalty would be warranted in this case. This took some 20 or 25 minutes, I would say, and other aspects were discussed, but, frankly, without my recollection being jogged, that's the main substance of what I remember of that conversation. I know that at the conclusion of that conversation and in discussing it with Mr. Williams later, we felt both reassured * * *."

Later Mr. Ladner was asked: (R. 91)

Q. "What was your impression when you left Judge Webb's office, aside from specific?

A. Definitely that I was reassured of entering a plea before Judge Webb. I say "I", actually it was Mr. Woodson's decision along with Mr. Williams, but I discussed it with them, that we were reassured * * * I would say, encouraged. There was a certain amount of inducement to it, under the circumstances. * * *".

It is not necessary, however, to rely upon the testimony of the petitioner nor of these two lawyers in establishing the fact that this conference actually took place as stated by them, for petitioner subpoenaed Judge Webb at the hearing before the Federal District Judge and his testimony appears at Page 100 of the Record.

Q. "Judge Webb, directing your attention to the month of January, 1957, do you recall holding a conference in your chambers with Fred Woodson and John Ladner, Jr., relative to the Edward Leon Williams case?

A. I remember a conference held with those two gentlemen in reference to the Williams case, I have no definite recollection as to the date, but I know it was before the proceedings had in the case.

Q. Can you tell the Court, please, generally, what was the nature of the conference and what was said as best you recall?

A. Well, * * * I do remember a discussion of the fact that I was * * * that my mind was weighed heavily after their inquiry about this case, that if this case came before me that it would be weighed very, very heavily on my mind, because of the fact that after having spent 12 or 14 years on the District Bench it had been my good fortune not to have had the duty to sentence any defendant to death * * *"

Q. (R. 102) "Do you recall then, specifically, telling them, in general, that you had never given the death penalty?

A. I did because that was a fact."

The Judge denied telling the two attorneys that he was conscientiously opposed to the death sentence, yet went on to say: (R. 102)

A. "* * * but I think I do remember that I said in certain instances that I had objections, personally, to the imposition of the death penalty under certain circumstances and in some cases, and that the facts of each case must govern my sentencing in that particular."

The Judge went on to testify that he could not say "yes" or "no" as to whether he told these fledgling lawyers

that the facts in the case, as he knew them to be, did not warrant the death penalty and in answer to the direct question of whether he told them he said:

> A. (R. 104) "Well, when you say it's possible that the statement could have been made, yes. I say that it is improbable that I made that statement."

It is clear from the above excerpts that when this same Judge was building his record through his questions and petitioner's answers at the time of sentencing, and asked petitioner had counsel or anyone else represented to him the sentence that he might receive when he pleaded guilty and petitioner told this Judge that it had been represented to him that he would receive the electric chair upon such a plea, not only on the kidnapping charge, but also on the armed robbery charge, that this Judge knew the record he was building did not speak the truth. This Judge knew that he had held this conference with petitioner's attorney, and he knew what he had told this attorney. He himself, had represented, through this conference with petitioner's attorney that petitioner would receive a life sentence for a plea of guilty. He, therefore, knew that the record he was building did not speak the truth, because he had been a party to the representations inducing a plea of guilty.

The attitude of this Judge is vividly reflected at Page 107 of the Record in answer to a question as to whether or not he believed his own Record when he built it. This

Judge knew that Fred Woodson, who was petitioner's attorney, was handling his first criminal case, and this Judge was accepting a plea and preparing to sentence a man to death for a crime that the longest sentence ever given before in Oklahoma since Statehood was 30 years. This man was waiving practically every constitutional right he had and appearing before this Judge with an inexperienced lawyer who was admittedly as nervous and as scared as the defendant. Under such circumstances, any semblance of judicial temperament whatsoever should have dictated that this Judge ascertain that the defendant knew what he was doing and been fully and completely advised of his rights. It was this Judge's duty before accepting that plea and pronouncing such sentence to see that such advice and consultation had been given. This Judge knew that the only place this man could have received that advice was from his attorney, Mr. Woodson, and therefore, it was his duty to ascertain if Mr. Woodson had advised this man.

Let's see what the Judge had to say on this proposition. Page 107 of the Record:

Q. "Did you believe at that time that Fred Woodson had actually told the defendant that he would receive the death penalty upon his plea of kidnapping?"

A. *I don't know whether I did or not. I wasn't concerned with what Fred Woodson had told the defendant*"

We urge a careful reading of the record this Trial Judge made at the time of sentencing petitioner. There is not one single, solitary place in such record that this Trial Judge informed or advised or told petitioner of one single right that petitioner had before the pleas were accepted. The entire line of questioning was leading, suggestive, and called for nothing but one word answers throughout. As a matter of fact, and this is the ironic part, no place in the record does the petitioner actually plead guilty in the manner required by law in Oklahoma, but the Court and his attorney does it for him. Oklahoma law states that every plea must be oral, must substantially conform to the statute that requires defendant to plead "guilty" and can in no case be put in except by the defendant himself. The only thing that the Court advised the petitioner of was that he was entitled to a two day waiting period before plea and sentence. He was informed of this right after a guilty plea had been entered, if one was legally entered at all.

In summation, we do not urge upon this Court that any one of the particular things we make complaint of could necessarily be pointed at and held to constitute a departure from due process of law. The waiving of any one of the twelve safeguards, a breakdown of the right to counsel problems into various stages, nor even the conduct of the Trial Judge in and of itself, when considered sep-

arately and apart from the whole are such things that reasonable men might look at and say such unit did not constitute a violation of due process. We urge, however, that when all such units are added together and not viewed separately or independently of each other, that the conclusion is inevitable that petitioner did not receive from the State Courts of Tulsa County the calm, fair, completely above board justice that he was entitled to from the State of Oklahoma before that society could forfeit his life. We know of no way to break down due process of law and fit the parts into nice, little compartments like so many hotel keys behind a clerk's desk. Due process to us is a feeling or sixth sense within us that tells us when we have looked at the complete overall picture that a given defendant received fair and above board treatment in the light of the result obtained. If that feeling does not exist, then due process was violated in the particular case under consideration. We feel that such happened here.

CONCLUSION

The petitioner respectfully urges that this writ should be allowed because the questions involved herein are important to the proper and orderly administration of state court criminal justice and Federal appellate procedure in habeas corpus hearings. This Honorable Court should grant this writ and hold (1) That the Court of Appeals

erred in refusing a stay of execution and in refusing to hear the appeal in the manner required by law and rule, or (2) Decide this case on the merits and hold that the State Courts of Tulsa County deprived petitioner of due process of law within the scope of the Federal Constitution in its failure to provide adequate and effective counsel in this capital case and that the State of Oklahoma, acting through its representative, the Trial Judge, deprived petitioner of his right to fundamental justice and fair play demanded by due process of law under the United States Constitution, or through a combination of these two points petitioner was deprived of due process of law.

Respectfully submitted,

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Oklahoma City, Oklahoma,
Attorney for Petitioner.

APRIL, 1960.

APPENDIX

FILED
United States Court of Appeals
Tenth Circuit
MAR. 30, 1960
Robert B. Cartwright
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 6351 — MARCH TERM, 1960

EDWARD LEON WILLIAMS,
Appellant,
VERSUS
ROBERT R. RAINES, Warden,
Oklahoma State Penitentiary,
Appellee.

Appeal from the United States District Court for the Eastern District of Oklahoma.

Whit Pate for Appellant.
Sam H. Lattimore, Assistant Attorney General, State of Oklahoma, for Appellee.

Before PICKETT and BREITENSTEIN, Circuit Judges, and KERR, District Judge.

PER CURIAM.

This is an appeal from a judgment denying an application for writ of habeas corpus. On Williams' plea of guilty to the charge of kidnapping he was sentenced to death by an Oklahoma trial court and that sentence is to be executed on April 4, 1960. The facts in this case are fully set out in the opinion of the United States Supreme Court in *Williams* v. *Oklahoma*, 358 U. S. 576, affirming *Williams* v. *State*, 321 P. 2d 990 and need not be here repeated.

An application for writ of habeas corpus to the Oklahoma Court of Criminal Appeals was denied,[1] and the United States Supreme Court denied certiorari on February 23, 1960.

Williams urges that he was denied due process of law in violation of the Fourteenth Amendment in that he did not have adequate representation by counsel and that he was misled by pre-arraignment statements of the sentencing court to his counsel from which he inferred that capital punishment would not be imposed.

The court has examined the aforementioned decisions and the record of the proceedings before the United States District Court. From such examination it appears that the issues now presented have been decided contrary to the appellant. In *Williams* v *Oklahoma*, *supra*, pages 578-579, footnote 3, the United States Supreme Court set out the essential portions of the arraignment proceedings at which the plea of guilty was entered. These show that the plea of guilty was entered freely and voluntarily with full information as to the sentence which might be imposed and that there had been no representation by counsel or anyone else as to the sentence which might be expected upon a plea of guilty. The record further discloses that the appellant at all times has had adequate and effective representation by counsel. In

1. *In re Williams*, 341 P. 2d 562.

deed, it appears that at the conclusion of the argument before the United States Supreme Court in this case appellant's counsel was publicly commended. In the United States District Court and in this court appellant has had the benefit of able counsel. The fate which awaits appellant is one of his own making and he cannot now lay the blame upon any of his lawyers.

We find no denial of due process and, accordingly, affirm the judgment.